Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
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REVIEW OF THE COMMISSIONS REGULATIONS GOVERNING TELEVISION BROADCASTING	)	**MM DOCKET NO. 91-221**
	)	
TELEVISION SATELLITE STATIONS REVIEW OF POLICY AND RULES	)	**MM DOCKET NO. 87-81**
	)	

COMMENTS TO FURTHER NOTICE OF PROPOSED RULE MAKING

BY THE

ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, INC.

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The Association of Independent television Stations, Inc. (INTV) hereby submits the following comments in response to the Commission's *Further Notice of Proposed Rule Making* in the above captioned proceeding.[1] As the leading trade association representing local television stations not affiliated with ABC, NBC and CBS, INTV has a significant interest in this proceeding.

I. INTRODUCTION

INTV is the only television trade organization to attempt to work out a consensus position on these issues. Our objective has been to foster an industrial structure which will allow us to compete with vertically integrated multichannel giants including cable and local telephone companies. Competition from multichannel providers is fierce and television stations must be allowed to grow or it will be swept aside. Accordingly, the FCC should modify the following rules.

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[1]*Further Notice of Proposed Rule Making* in MM Dockets Nos. 91-221 and 87-8, FCC 94-322, 60 Fed. Reg. 6490, (released January 17, 1995).

Duopoly Rule:	**Television station owners should be permitted to own up to two television stations in a local market, provided one of the facilities is a UHF station.**
National Rule:	**The current 12 station numerical cap should be eliminated. The FCC should relax its audience reach cap from 25% of the national audience to 35% of the national audience. No change should be made in the way UHF stations are currently counted under the audience reach cap. Further relaxation of this rule should follow the time frame established by the FCC in its *Further Notice*.**

These positions are fully consistent with the competitive and diversity framework discussed in the *Further Notice*. The following discusses each of these proposals in the context of the analytic framework established by the Commission.

II. THE DUOPOLY RULE SHOULD BE REVISED TO PERMIT THE COMMON OWNERSHIP OF TWO TELEVISION STATIONS IN A LOCAL MARKET, PROVIDED ONE OF THOSE STATIONS IS A UHF FACILITY

Pursuant to this proposal, an entity would be permitted to own up to two television stations in a local market, provided one of those stations is a UHF television station. Accordingly, this proposal would permit co-located UHF/UHF and UHF/VHF combinations in local markets.

A. Economic Competition Issues

The Commission's competitive analysis focuses on three salient issues: 1) effects on the market for delivered video programming; 2) effects in the market for local advertising; and 3) effects on the video program production market. Employing these criteria demonstrate that INTV's proposal should be adopted by the Commission.

1. Effects on the Market for Delivered Video Programming

INTV agrees with the Commission that commercial broadcast television stations compete with each other, with public broadcast stations, with cable systems operators, with wireless cable operators and potentially with DBS operators in the delivery of video programming. Moreover, given recent legislative, judicial and FCC decisions, there is no doubt that local telephone companies will soon be in the business of delivering video programming directly to the household.

Given this multi-channel environment it makes little sense to restrict off-air television stations to just one video channel per market. Such limitations impede a stations's ability to compete in the marketplace today and will prevent it from competing tomorrow. On this point the FCC's Office of Plans and Policy was correct in observing that by the end of the decade some UHF television stations in major markets would cease to exist due to multi-channel competition[2].

a) Evidence of cross elasticity and substitutability

The *Further Notice* solicits comments on the substitutability between local off-air television stations and cable systems. Such evidence is important, because it demonstrates the competitive relationship between the two mediums.

Comparisons of substitute choices between off-air television stations and other video distribution modes are inexact because local off-air television is provided to consumers for free whereas all other multichannel competition is subscription based. In many respects, the provision of free off-air television is a "public good."[3] As a result, cross elasticity models, which evaluate consumer purchasing decisions between specific products, are not necessarily applicable.

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[2] FCC Office of Plans and Policy, *Broadcast Television in a Multichannel Marketplace*, June 1991 at vii.

[3] Owens, Bruce and Steven Wildman, *Video Economics*, 1992 at 23.

Nevertheless, at least with respect to the comparison between cable television and off-air television, there is some evidence that consumers view these as substitutes. During the cable rate regulation battles, the cable industry submitted studies indicating that the number of off-air television stations in a market influences cable rates. A study submitted by NTIA and the cable industry showed a direct linear relationship between the number of stations available in a market and lower cable rates.[4]

These studies demonstrate several key points. First, there is a direct relationship between the number of off-air choices available in the market and price discipline on cable rates. It would appear that the price disciplining effect is based on a consumer's decision to forego cable television service and opt for the off-air choice. The decision to opt for off-air signals is a function of the total number of off-air signals that are available in the market. The more off-air signals that are available, the greater the chances that consumers will select the off-air option, thereby influencing cable rates.[5] In effect, the aggregate number of off-air signals may act as another multi-channel option which is available to consumers.

Second, the data suggest that policies should be directed to sustaining, if not increasing, the maximum number of off-air television signals that are available in each local market. The more off-air signals available in the market, the more choices consumers have. In this regard, the economics of the off-air market become vitally important to promoting competition with subscription based wire-line services.

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[4]Clifton, James, Nathan Associates, *Must Carry and Effective Competition in the Emerging Video Marketplace: A Re-Examination of the Evidence*, October 25 1991, submitted with *INTV Reply Comments* in MM Docket No. 90-4, November 1991.

[5]Of course this does not mean that cable lacks the ability to act as a monopoly bottleneck. If given the chance, cable will act on the incentives to deny carriage to local television stations. In turn this will reduce the economic viability to the off-air stations in the market reducing the attractiveness of the off-air option. Without such carriage, an individual station will be unable to reach its audience, becoming economically crippled. With fewer stations in the market, the price disciplining impact of local stations on cable rates is significantly reduced. The result is higher cable rates and more revenues for the local cable operator.

Third, there is every reason to believe that a similar relationship will exist between the number of off-air television stations and the new wire-based delivery systems that will be built by the telephone companies. If a full supply of off-air signals are available, consumers will have the option of selecting these signals rather than telephone company video programming.

INTV believes the Commission should presumptively include telephone company video services in defining the product market for the delivery of video services. The provision of video product by the telephone companies is at hand. For example, Ameritech, which won approval to build broadband networks in five states passing 1.3 million homes plans to pass 300,000 homes (nearly one quarter of its service area) by year's end.[6] Also, Bell South, Ameritech, SBC Communications, Inc. and Disney just signed a $500 million dollar deal. Also, it is clear that the telcos themselves view VDT systems and traditional cable operations as potentially interchangeable.

> Noting that "we're enthusiastically awaiting the completion of work on VDT at the Commission," [Ameritech VP, Gregory] Brown said it could well be that VDT and the cable model both prove viable, depending on market circumstances in any given area.[7]

Accordingly, the FCC should presumptively consider telephone company entry into the video business in crafting its local ownership rules. The potential entry of the telephone companies into video distribution has already affected the market. Rules should be drafted with an eye towards the future. Indeed, the Commission has an obligation to make predictive judgments as to what will happen in the future when crafting its policies. The failure to consider the impact of telephone company entry today, will render new FCC rules obsolete in a very short period of time.

Finally, other subscription based competitors have entered local markets. The growth of DBS has been phenomenal. DBS, which offers 150 channels of digital video service, now has nationwide reach. Subscribers are estimated to reach one million in 1995 and ten million

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[6]Multichannel News, April 24, 1995 at 70.

[7]*Multichannel News*, April 24, 1995 at 1.

by the end of the decade.[8] While this is a nationally delivered service, it will have tremendous impact in the viewing patterns in local markets.

MMDS which has not been a significant player in the past, will soon become a formidable competitor. Bell Atlantic and NYNEX have reinvigorated the MMDS business investing $100 million in this technology. Ameritech and Bell South are actively seeking to invest in MMDS.[9] PACTEL is buying Cross Country Wireless Inc. which covers large segments of Southern California for $175 million.[10] In the words of a PacTel executive:

> If I look at the world of telephony, there's wireline and there's wireless...[W]hether we use wired or wireless, what customers are looking for is better reliability than they're getting today from cable.[11]

In sum, in a multi-channel environment, it becomes increasingly important to compete on a multichannel level. Unfortunately, the existing duopoly rule precludes local off-air television stations from competing effectively in this marketplace.[12]

b) The geographic market should be the local television station's DMA.

For consumers relying strictly on off-air television, the geographic scope of the market depends on the ability to receive a broadcast signal. In turn, reception service is a function of

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[8]*Cablevision*, November 4, 1994 at 6. USSB, estimates that 40 % of all television households will be receiving DBS service in seven years.

[9]*Multichannel News*, April 24, 1995 at 1.

[10]*Multichannel News*, April 24, 1995 at 2.

[11]*Multichannel News*, April 24, 1995 at 2.

[12] While, DBS and MMDS will compete with local off-air television stations for viewers, there is also a complementary relationship as well. Importantly, the Commission has relied on these multi-channel services to compete directly with cable systems. However, subscribers to these services rely on free local off-air television signals to provide a full complement of signals. If the number of local off-air services begins to decline, then these competitive alternatives to wire based video services lose their competitive edge. Absent a local nexus, DBS and MMDS will be at a competitive disadvantage to cable and telephone video systems because of their ability to provide local channels on the wire. FCC policies directed towards sustaining the maximum number of local off-air television stations has the salutary effect of enhancing the competitive posture of DBS and MMDS systems.

many factors, including terrain, quality of the antenna (either set top or roof mounted), the location of the station's tower, and the channel assigned to a particular station. With regard to the last factor, VHF signals are obviously superior to UHF signals. Even among UHF stations, the propagation characteristics of lower numbered UHF stations are superior to channels found in the upper end of the UHF band.

Nevertheless, relying solely on contour overlap standards does not provide an accurate description of a television market. In the crowded east coast markets, Grade B and even Grade A signals overlap stations in other markets. For example, the Grade A signals of the Baltimore stations overlap large portions of Montgomery and Prince Georges and even Arlington counties. Yet these counties are clearly within the Washington television market. In New England, the Grade A contours of the Providence, Rhode Island stations overlap Boston, which is a separate market. The reverse is also true. In New York, the Grade A signals of the New York stations run as far south as Trenton, New Jersey, which is in the Philadelphia market.

The opposite is true in the west. Even prior to the deployment of cable television, the markets for cities like Phoenix and Albuquerque extend far beyond Grade A or even Grade B signals.[13]

If the Commission desires to base modifications of the duopoly rule on economic and market considerations, then the geographic scope of local markets should be based on predominant viewing patterns not contours. Programming is purchased and advertising is sold on a DMA basis, not on the geographic scope of a station's signal. Congress in establishing new must-carry rules defining local television markets in terms of Arbitron's Area of Dominant Influence (ADI).[14] More recently, the 1976 Copyright Act was modified, changing the definition

[13]Many of the stations in the west employed translators or microwave facilities to reach consumers in outlying areas. Generally, the geographic size of television markets that are based on viewing patterns (DMAs or ADIs) have not changed significantly with the introduction of cable. Comparisons of television markets pre and post cable reveal that the markets are similar in geographic scope.

[14]In presumptively considering the ADI as a local station's relevant geographic market, Congress referenced the FCC's national multiple ownership rules stating:

of a local signal under the cable copyright law to comport with the market definitions contained in the 1992 Cable Act. As a result of this change, cable systems can carry local stations without incurring a distant signal payment. Local markets will now be defined in terms of a station's DMA as determined by Nielsen or other accepted audience measurement.[15]

A superior geographic measure is the station's Designated Market Area (DMA). This is the only true economically based market definition.

c) Measurement of market power

INTV respectfully disagrees with the *Further Notice* which tentatively proposed to use the number of separately owned stations or outlets as the appropriate market power measurement. According to this definition, multi-channel providers such as cable and telephone company video dialtone systems, would be considered the same as the owners of single channel television stations.

Such a measurement has no bearing on economic reality. First, in each community, the cable system is virtually a monopoly "bottleneck" offering multiple channels. The market power of cable systems in no way compares to the ownership of a television station. Veronis, Suhler explains in the context of retransmission consent negotiations:

> By contrast, with only a few exceptions, each cable operator is the sole provider of cable services in its market area. Consequently competitive companies were

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> That regulation deems a television station's market to be in its Area of Dominant Influence (ADI)... The Committee recognizes that ADI lines establish the markets in which television [sic} buy programming and sell advertising....The Committee believes that ADI lines are the most widely accepted definition of a television market and more accurately delineate the area in which a station provides local service and any arbitrary based milage-definition.

House Report, Cable Television Consumer Protection and Competition Act of 1992, Rept. No. 102-628, June 29, 1992 at 97.

[15]Senate Report, Satellite Compulsory License Extension Act of 1994, 103rd Cong. 2nd Sess., Rept No. 103-407, October 7, 1994 at 15.

negotiating with monopolies, with the expected result that the negotiating power resided almost entirely with the cable systems.[16]

It was precisely the uneven economic balance between local off-air television stations and local cable systems that led the FCC to initiate this proceeding in the first place. It is therefore incongruous that the FCC would now consider a cable system as being equivalent to a local television station for the purposes of its local television ownership rules. The trend towards clustering will further elevate the market power disparity between cable systems and local off-air television stations.[17]

Second, the more appropriate measure of market power should be the number of channels that are available to consumers in each market. Considering a cable system as only one outlet in a local market ignores the reality of the cable business. Unlike broadcasters, who exercise editorial control over the programs appearing on their stations,[18] cable operators are merely passive retransmitters for most of the cable networks appearing on their systems. From a program distribution perspective, each channel of cable network programming is independent, making day to day decisions regarding which programs will be provided. The type and supply of programs that are made available to consumers in each local market does not rest with the cable operator. Cable operator discretion, if any, is limited to the decision as to what cable networks will appear on the system. Once this choice is made, there is no further editorial decisions made.

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[16]Veronis, Suhler & Associates, Communications Industry Forecast, at 90.

[17]Counting each cable system in a television stations market raises analytic problems. For example, assume their are five independent cable owners serving five communities in a local television station's market. Under the FCC proposed market power approach, would these five cable operators be counted as five outlets? From the subscriber's standpoint, however, each community has only one cable system. Accordingly, it should make no difference whether cable systems in other communities are separately owned. Alternatively, it is not clear whether the Commission will look at the entire local television market and count all cable systems, in aggregate, as one additional outlet.

[18]Independent stations purchase programming directly from suppliers. Network affiliates have the ability and at times do, in fact, pre-empt network programs.

Analyzing the number of channels is the best proxy for examining an entity's market power, because it the closest measurement on how consumers use television. People watch programs, not technology. Obviously, it would be extremely difficult to base market power measurements on the number of programs that are available in each local market.[19] However, measuring channels provides the best measure of the number of programming options that are available to the public.

Third, examining the number of channels should not cause the Commission measurement problems. In fact, Commission decisions in other contexts have employed such an analysis. For the most part, the number of programming channels offered by individual cable systems remains fairly constant. While some services may be dropped and others added, the number of channels available to consumers will not change unless there is a system re-build. Also, while the number of channels available on cable systems may vary from cable system to cable system and from community to community, the Commission could easily take the average number of channels that are available in all communities located within a station's DMA. This calculation is made easier by the fact that cable systems are generally franchised on a county by county basis and comports with DMA market analysis which is based on viewing patterns on a county by county basis.

Finally, the FCC's competitive model should not be predicated on the number of "separately owned" outlets. While the concept of "separately owned" may have some relevance to the FCC's diversity concerns, it has no bearing on the economic equation. From an economic standpoint, local market competition and the programming choices available to the public within that market are a function of the number of facilities available regardless of common ownership.[20]

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[19]In a similar vein analyzing market power in terms of audience share would be too unwieldy. The audience shares of particular programs or channels will vary depending on the popularity of the programs that appear at a particular time.

[20]For example, the FCC's radio rules has led to increased common ownership at the local level. Under a separately owned analysis, the Commission would presumably count these commonly owned facilities as one outlet. However, the common ownership of an AM and FM

d) Advertising markets

The Commission is correct that local advertising constitutes a separate market. Relaxing the duopoly rule will in no way increase concentration in this market. Multi-channel competitors are providing significant competition at the local level. At the individual system level, cable operators are able to provide specifically targeted and localized advertising services.

Cable systems are able to package local advertising over a variety of programming channels. Local advertisers are in a position to target specific audiences in specific communities based on the target audience of a particular channel. For example, the local sporting goods store can purchase time on ESPN or the local sports channel. Alternatively, local advertisements can be placed on more generalized programming channels such as TNT, USA or CNN. Finally, the vast majority of cable operators have the flexibility to offer local advertisers a package of 30 or more channels which includes several different programming services that cover a broad cross-section of the local audience.

Increases in clustered systems and cable interconnects give cable the ability to provide regional coverage. For example, the New York City interconnect, WNYI, provide a coverage from the tip of Long Island, into New Jersey, up to Northern Westchester County, New York, through several Connecticut Counties and, of course, throughout the burroughs of New York City. In effect, the New York Interconnect provides coverage equivalent to the New York DMA. Also, local advertisers have the ability to provide specific coverage to sub geographic areas of the system. The advertising effectiveness of local cable interconnects is well known. In the past year, the major interconnects and clustered MSOs have enjoyed dramatic increases in advertising revenues:

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station does not alter the fact that both facilities are competing and offering programs to the local market.

Growth in Local Cable Advertising

1994 to 1995[21]

Interconnect,MSO or System	**First Quarter Growth 1995 vs. 1994**
Adlink	**32%**
Cable AdNet of N. Carolina	**15%**
Cox Communications	**17%**
Falcon Cable	**18%**
Chicago Interconnect	**20%**
Jones Intercable	**25%-28%**
New York Interconnect	**34%**
Northwest Cable Advertising	**3%**
Post-Newsweek Cable Inc.	**16%-17%**
Prime Cable	**30%**
Tampa Bay Interconnect	**30%**
Tele-Communications Inc.	**20%**
Time Warner Cable Cincinnati	**12%-15%**
Time Warner CityCable, NYC	**35%**

Local cable advertising revenues have increased at double digit rates. Between 1988 and 1993, local and spot cable advertising increased at a compound annual rate of 17.5%. Estimates for the 1993-1998 period show a compound annual increase of 14.2%.[22]

In part, the strong growth in local advertising [on cable] is a consequence of the overall strength of the local marketplace. In addition, however, cable operators have put far more effort into attracting local advertising in recent year than they have in the past when they could automatically rely on double digit subscription spending growth.[23]

The acceleration of local cable spot growth can be seen in the tremendous growth by Adlink, a cable interconnect in Los Angeles. In 1988, Adlink's growth ad revenues were $837,000. Projected sales for 1995 amount to $30.8 million. In the words of an Adlink executive:

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[21]*Multichannel News*, April 17, 1995 at 1.

[22]Veronis, Suhler & Associates, *Communications Industry Forecast* at 131.

[23]Id. at 123.

We've come light years in the last five or six years," said Thurston, who joined the interconnect in April 1989 as its general sales manager. "If you graph the dollars being spent on spot cable pre-1988, and being spend today, its a great story, but we think it can even be a better story.[24]

The double digit growth in local cable advertising revenue should be contrasted against the relatively flat increase that occurred in local television station local advertising revenue. Between 1988 - 1993 local advertising revenue grew at a compound annual growth rate of only 3%. Projections for the 1993-1998 period indicate that the compound annual growth rate for local advertising on local television stations will be only 6.4%, less than half the growth rate for cable television.[25]

The Commission should not limit its analysis of local advertising to broadcast television and cable. The telephone companies are actively seeking to enter local advertising markets. A recent supplement to *Multichannel News* explains:

> Although the regional Bell operating companies are being very quiet about their strategies, in many cases they are looking to the cable industry for both consulting advice, vendors and ad managers so they can create local ad sales operations in markets they are entering with video networks.[26]

For example, in Dover Township N.J., where the FCC has granted authority to build a video dialtone system, Futurevision has already commenced local advertising efforts.

> [S]everal telcos aren't waiting until they have subscribers before they establish local ad offices. They are taking steps to organize and set up their infrastructures now, and are pitching and selling. For example, FutureVision CEO Robert Schena said he has already signed up a major supermarket in Toms River, N.J., to distribute "electronic coupons" to subscribers.[27]

In Chicago, Ameritech is looking at digital ad insertion equipment for its VDT system in an effort to pursue local advertising. The cable interconnect in Atlanta, Cable Advertising of Metro Atlanta, is owned by a Telco, U.S. West. U.S. West is moving into the local interactive

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[24]*Multichannel News Supplement*, March 27, 1995 at 7A.

[25]Id. at 94.

[26]"Telcos Calling on Local Advertisers", *Multichannel News Supplement*, March 27, 1995 at 26A.

[27]*Id.* at 40A

advertising market with "GOtv," which is appearing on Time Warner's Full Service Network in Orlando, FL. and on U.S. West's digital TV system in Omaha, Nebraska. In Bell South's 12,000 home test system in Chamblee, GA, local spot and zoned spot advertising will be the responsibility of providers leasing capacity on the system. Sprint is in the early stages of planning its local advertising strategy on its VDT trial in Wake Forest, N.C.[28]

Perhaps the best evidence of the telephone companies' plans for local advertising were summed up by Bell Atlantic CEO Raymond Smith. Bell Atlantic's view is to provide local interactive advertising.

> What two-way interactivity will bring to the table for advertisers, according to Smith is the ability to immediately measure and track their message's impact on buying behavior. In that kind of arena, the DMA becomes rather meaningless.[29]

Telephone company entry into local video markets is at hand. The advertising alternatives provided by telephone company video systems will soon become important players in the marketplace. To the extent the Commission wants to craft its rules with an eye towards the immediate future, the telephone company video systems should be included in the local advertising market.

Finally, by relaxing the duopoly rule, the Commission will be creating more viable advertising alternatives in local markets. No one wants to advertise on a weak station. Co-located television stations will be able to provide more attractive audiences to local advertisers, because the stations will be able to afford better programming.

2. Video Program Production Market

The *Further Notice* expresses concern that relaxation of the duopoly rule may force program suppliers "to sell their product at below competitive market prices in order to gain

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[28]Id. at 40A

[29]*Id.* at 21A

access to the local market controlled by one or a few local group owners."[30] Such fears are not only unfounded, but the opposite is true.

a) Relaxing the rule will create economically sound purchasers

Assuming *arguendo*, that the television broadcast market is a separate market with respect to purchasing program products, modifying the dupopoly rule will assist in providing additional purchasers for programming. Given the current state of multichannel competition at the local level, there is a real question whether individually owned stations, especially UHF stations will survive. Individually owned stations will become weaker and unable to afford top quality programming product. (Indeed, many of the LMAs that exist in today's marketplace have kept some UHF stations economically viable in local markets.)If modifications to the local rules are not made, program suppliers will have fewer purchasers for their product. Relaxing the rules will insure that local off-air broadcast facilities will continue to be in a position to purchase such programming.

b) Cable, telephone companies, DBS and MMDS are fierce competitors for programming

As the *Further Notice* points out, however, the increase in alternative distribution technologies, e.g. cable, attenuate any concentration concerns. Program suppliers have several alternatives for the sale of their product, including broadcast network, cash syndication, barter syndication and sales to cable networks. Between 1988 and 1993, cable networks have increased their expenditures for programming dramatically.

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[30] *Further Notice* at para 110.

Expenditures on Entertainment Programs
(In Millions)[31]

Year	Cable	Local TV
1988	1,334	1,680
1989	1,640	1,785
1990	1,909	1,864
1991	2,087	1,765
1992	2,232	1,817
1993	2,378	1,891
1994	2,485	1,995
1995	2,650	2,130
1996	2,875	2,260
1997	3,110	2,390
1998	3,350	2,520

Cable networks have simply out-spent local television stations. In fact, looking at total expenditures for television-filmed entertainment reveals that cable networks are second only to the broadcast networks, accounting for a greater share of the market than local television stations and barter syndication.

Shares of Total Expenditures on Entertainment Programs[32]

Year	TV Nets.	TV Stations	Cable Nets.	Barter Syndication
1994	38.1	20.3	25.3	16.3
1995	37.7	20.3	25.3	16.7
1996	37.4	20.2	25.6	16.8
1997	37.4	19.9	26.0	16.7
1998	37.5	19.7	26.2	16.6

It would appear, therefore, that alternative distribution systems, especially cable, eviscerate any concerns regarding undue concentration with respect to the purchasing of nationally distributed program product.

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[31]Veronis, Suhler & Associates, *Communications Industry Forecasts* at 151. Statistics from 1994-1998 are projections.

[32]*Id.*

Moreover, the FCC should not discount the ability of program suppliers to sell programming to new telephone company video distribution systems including newly acquired wireless systems. Earlier this year a consortium of telephone companies (NYNEX, Bell Atlantic and Pacific Telesis) joined forces with Creative Artists Agency to start a new programming venture with former CBS executive Howard Stringer. TELE-TV will initially distribute programming through interactive, digital wireless services, supplying one million homes this year and expanding to ten million homes by the end of the decade.[33]

Disney entered into a 500 million dollar programming deal with Ameritech, Bell South and SBC Communications, Inc. According to *Broadcasting and Cable*:

> Disney's pact with Ameritech, Bell South and SBC Communications will invest $500 million during the next five years to assemble a line up of programming and deliver it via the phone companies' evolving video dial-tone networks.[34]

The venture has the ability to reach 50 million customers in 19 mid-western and southern states. According to Ameritech VP, Patrick Campbell, Ameritech will begin offering services by the end of this year in the Chicago and Detroit suburbs.[35]

c) Duopoly relaxation will help new emerging networks

The Further Notice raises some concerns regarding the development of new off-air television networks. The Commission questioned whether relaxing the rule would adversely affect the pool of independent stations available for acquisition by/and or affiliation with these new networks.[36] These fears are unfounded.

The success of any new emerging television network depends on the strength of its affiliate base. New networks do not role out an entire schedule of prime time or daytime programming all at once. Rather, the network programming rolls out slowly over a number of

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[33] *Broadcasting and Cable*, May 15, 1995 at 32.

[34] *Broadcasting & Cable*, April 24, 1995 at 33.

[35] *Id.* at 34.

[36] *Further Notice* at para 112.

years. This was the pattern with the development of the Fox network and will certainly be the pattern of the new UPN and WB networks.[37] Accordingly, it is vitally important that these affiliates have the best programming available during those hours when the networks are not programming. Access to such top quality non-network programming is essential to the new affiliates' overall position in the marketplace.

It is vitally important that a new, emerging network form affiliation with the strongest possible station in each market. This has been the pattern of network growth. ABC affiliated with the remaining VHF stations where possible. Fox affiliated with the strongest UHF independent stations when it commenced its network in the late 1980's. Indeed, Fox's decision to "upgrade its network" and switch from UHF affiliates to VHF facilities demonstrates this fact. UPN and WB have been in a pitched battle to affiliate with the strongest independent stations in each market.

New affiliates face formidable challenges in the marketplace. Viewing patterns to the established networks must be changed. Also, many of the new network affiliates are UHF stations, which are at a significant disadvantage compared to the established VHF competitors. Because modification of the local ownership rules will enhance the competitive posture of existing independent stations, this will benefit the competitive posture of these new networks.

Owners of commonly owned facilities in local markets will not restrict the number of stations available for possible affiliation. The analysis assumes that an owner, who has affiliated with an established network, would purchase another facility, and prevent that commonly owned facility from affiliating with a new network. There is no evidence to demonstrate that this is even a remote problem. The television industry has many group owners with different affiliations in different markets. The overwhelming economic incentive for these owners is to increase the profitability, hence economic value of the stations they own. This means securing the best possible programming and network affiliations. It is inconceivable that an entity owning

[37]Both UPN and WB networks initially rolled out two hours of prime time programming on one night this year.

two facilities in a single market would decide not to affiliate with one of the emerging networks in order to benefit its other owned facility that happens to be affiliated with an established network. Engaging in such behavior would not inure to the benefit of the group owner *per se*, but rather to the established network.[38]

B. Diversity Considerations

From its earliest days of regulating television, the FCC has struggled to balance the twin goals of promoting individually owned stations while, at the same time, creating economic combinations that are competitively viable. In a perfect world, the Commission could fellow the Jeffersonian model, promoting a completely atomistic broadcast structure made up of individually owned stations. Such an approach has been found to be unworkable and the Commission has permitted common ownership in a variety of circumstances. INTV recognizes that diversity concerns are most acute at the local level. Nevertheless, the economic pressures from multichannel providers requires the Commission to re-think its approach.

1. The Market for Diversity Should Include Television, Cable Channels, Newspapers, Radio, Magazines and On-line Computer Services

As the *Further Notice* accurately documents, the number of voices available in local markets has increased significantly. Both outlet and viewpoint diversity have increased in local markets. This is especially true with respect to subscription based services such as cable television, DBS and MMDS. Telephone company entry into the video business will further expand viewpoint diversity. Add to this electronic publishing and on-line computer services. Today, there is no diversity problem in local markets.

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[38]Such incentive would arise, if at all, only in cases where the facilities are themselves owned by one of the established networks. In these cases, it may be possible that ABC, CBS or NBC, as group owners, might want to impede the development of competing networks. INTV believes that the FCC is perfectly capable of monitoring these combinations to insure that such activity does not take place. The duopoly rule is not needed to police such behavior.

As noted previously, each cable channel represents an independent voice.[39] Approximately 95% of cable subscribers have access to 30 or more channels. Program choices for cable networks are made by the cable networks themselves, not the local cable operator. Each channel should be considered an independent outlet and voice in the Commission's diversity analysis. At the very least, cable channels like CNN, CNBC and local news channels, such as News Channel 8 in the Washington, DC area, should be considered as a separate voice. PEG access and leased access provide additional outlet and viewpoint diversity in local markets.

The *Further Notice* attempts to limit the Commission's analysis to "core" news and public affairs programs especially with regard to local issues. Such an approach is too restrictive, creating an artificial distinction based solely on the way in which information is conveyed to the American public. For example, under the FCC's proposed analysis cable networks such as MTV, USA and the Family Channel would not be considered as an independent outlet and/or voice in its diversity analysis. Yet, MTV has its own version of the news. The Family Channel airs CBN news and other channels have news or public affairs type programming. President Clinton found MTV's targeted youth audience was important enough to conduct a discussion with America's youth during the last campaign. While not your classic "news conference," the program was important for America's youth. The Family Channel attempts to promote specific pro-family values in its program selection.

Also, limiting diversity analysis to program channels or services that provide "core" news and public affairs programs ignores the fact that views and opinions can be transmitted through a variety of program formats – including entertainment programs. The Commission has never stated that entertainment programs could not be considered by a television station in meeting the needs and interests of a community. Without digressing into a metaphysical discussion, entertainment programs certainly help shape local opinion on a variety of issues. For example, the mini-series "Roots" provided all Americans with a sense of the African American experience in this country. In fact, because entertainment programs draw large cross-cultural audiences,

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[39]*See* discussion, *infra*, at 9.

their impact on attitude formation may be greater than the traditional "talking heads" news format.

The Commission should not limit its local diversity analysis simply to those sources that are devoted to "local issues." There is no bright line between local, national and even international issues. Does a nationally distributed program addressing problems of drugs in school impact on local decision makers? Yes it does. Are issues such as the federal deficient local? Many members of Congress can testify to the fact that this issue has significant local impact.

The *Further Notice* also appears to give reduced weight to the impact of newspapers or radio stations, claiming that they are not equivalent to television stations for diversity purposes.[40] The Commission's analysis is misplaced. If newspapers have such limited impact on diversity, then why does the FCC continue to enforce a rule preventing the common ownership of newspapers and broadcast stations in the same market. If the FCC's analysis is correct then there is no need for such a rule. The same would hold true for the FCC's limits regarding television and radio ownership. Also, it is difficult to square the FCC's analysis with reality. Recent statements by the President and other government officials regarding talk radio demonstrates that radio has a significant impact on attitude formation in local markets and across the country.[41]

The fact that newspapers and cable networks may not be subject to public interest requirements would appear to be irrelevant to the FCC's diversity analysis. No one doubts that local newspapers cover local issues and contribute to the political debate in the community. The fact that they are under no legal compulsion to do so does not obviate the fact that they are contributors. Whether driven by legal requirements or marketplace forces, media outlets

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[40]*Further Notice* at para 74. According to the *Further Notice* television is 1) more immediate than newspapers, 2) has public interest obligations not shared by newspapers, 3) has more visual impact than either newspapers or radio and 4) is used by more people as their primary news source than are either radio or newspapers. Even if this analysis is correct, it does not focus on attitude formation –which is at the heart of diversity analysis.

[41]*Broadcasting and Cable*, May 1, 1995 at 6.

such as radio, newspapers, individual cable channels and television stations should be considered part of the local market for diversity.

2. Diversity in the context of free, off-air broadcasting

The *Further Notice* raises questions whether subscription based services should be included in its diversity analysis. In this regard, the Commission notes that unlike broadcasting, one must subscribe to cable and that only two-thirds of those having cable actually subscribe.[42] The Commission's concerns about access to diversity emanating from "free" off-air broadcasting as opposed to subscription based services raises a significant issue.

At the outset, the Commission's position in the *Further Notice* contradicts its position in other proceedings. For example, in the Prime Time Access Rule proceeding, the FCC questioned whether there was a need to continue the rule because consumers could access programming from a variety of subscription based services.[43] In that proceeding the Commission implied that cable and other subscription services were substitutes for off-air television broadcasting. The fact that consumers have to pay for cable and other subscription services did not seem to matter. In fact, the FCC questioned whether retaining the rule was necessary simply to help the 30% of Americans that do not subscribe to cable and rely solely on off-air broadcasting.[44]

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[42]*Further Notice* at para. 66.

[43]*Notice of Proposed Rule Making: Review of the Prime Time Access Rule*, MM Docket No. 94-123, FCC 94-266 (released October 25, 1994).

[44]The Commission cannot have it both ways. In the PTAR proceeding it attempts to treat off-air television broadcasting as any other video distribution service, giving traditional diversity concerns regarding free off-air television secondary status. In that proceeding the Commission argues that in the absence of a market disfunction or demonstrable market power on the part of the major networks, there is no need for structural rules. According to the Commission, consumers can get their information and entertainment programming from pay services if they desire. The PTAR proceeding treats off-air television as a commodity, down playing the public good aspect of the service as well as the Commission's obligation to promote program diversity in the off-air television service.

In the instant proceeding however, the Commission pursues a different approach. It is not simply concerned whether increased concentration at the local level raises anti-trust

INTV understands the Commission's concerns regarding the distinction between "free" over-the-air television as opposed to subscription based services. Free over-the-air television occupies a unique and significant role in our society helping to prevent a society of information "haves" and "have nots." There are significant societal issues regarding access to information that are at stake if free off-air television is treated just like any other pay subscription service. Indeed, it is from this perspective – retaining the maximum number of free-off air television facilities – that justifies a modification in the duopoly rule. While the Commission's pursuit of individually owned stations in local markets made sense years ago, this objective is no longer valid. Times have changed.

Competition from multichannel providers at the local level has placed considerable economic stress on free, local, off-air television stations. The Commission can no longer be assured that individually owned outlets in local markets will survive or be in a position to provide quality programming to their communities. This is especially true for UHF stations. As a result, policies directed toward maximizing individually owned stations at the local level will be counterproductive, leading to weaker less diverse programming. Viewpoint diversity will suffer. It is unrealistic to expect local stations to finance new, expensive news operations if they cannot capture the efficiencies of combined operations.[45] The same is true for top quality children's programming.

Commission policy should be directed at maximizing the total number of free off-air voices in the marketplace, regardless of ownership. Such a policy will ensure that free, over-the-air television remains as a viable viewing option, especially for those who are unable to afford subscription services.

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concerns. The pure marketplace model fostered in PTAR has been changed. Rather the FCC elevates its "diversity concerns" proposing to retain local ownership rules on the basis of promoting outlet diversity, especially for those unable to subscribe to pay subscription services. These contrary positions cannot be reconciled.

[45]Initial start up costs for news operations can range from $100,000 in the smallest markets to over $2.5 million. *See Independent Television*, October 1990 at 14.